APPEAL NO. 040514
FILED APRIL 28, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on February 9, 2004. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 16% as certified by her treating doctor. The appellant (carrier) appealed, asserting that the hearing officer erred in not giving presumptive weight to the certification of the Texas Workers' Compensation Commission (Commission)-selected designated doctor; that the certification of the treating doctor was not assigned with reference to the stipulated date of maximum medical improvement (MMI); and that the hearing officer failed to clearly detail the evidence she relied upon in determining that the designated doctor's certification is against the great weight of the other medical evidence. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____; that the compensable injury was to the bilateral hands/wrists, including reflex sympathetic dystrophy (RSD); and that the claimant reached MMI on February 9, 2001. On February 9, 2001, the claimant attended a required medical evaluation (RME) at the request of the carrier. The purpose of the examination was to determine MMI and IR. The RME doctor certified that the claimant was at MMI as of that date, with a 5% IR based upon right upper extremity weakness. The RME doctor did not rate, nor does it appear that he was aware that the claimant had, RSD.

On April 17, 2001, the claimant was examined by the designated doctor. He certified that the claimant had reached MMI on February 9, 2001, with a 0% IR. The designated doctor's IR was based upon a diagnosis of bilateral carpal tunnel syndrome (CTS). In his report, the designated doctor wrote "[claimant's] current examination is nonanatomical and factitious. One would not expect any permanent impairment secondary to a [CTS] decompressive operation. [Claimant's] current examination is factitious." On July 30, 2002, the Commission sent the designated doctor a letter of clarification. In the letter, the designated doctor was informed that the carrier had accepted RSD as part of the compensable injury, and additional medical records were enclosed. On August 1, 2002, the designated doctor responded that his opinion regarding MMI and IR remained unchanged. He repeated his opinion that the examination of the claimant was factitious, and stated that the diagnosis of RSD is controversial. He stated that at the time he examined the claimant, she demonstrated none of the accepted criteria for the diagnosis of "so-called RSD." The designated doctor did agree to reexamine the claimant. On September 9, 2002, the designated doctor reexamined the claimant. His opinion regarding MMI and IR remained unchanged, and he specifically stated that he does not believe the claimant has RSD.

On January 6, 2003, the claimant's treating doctor certified that the claimant had reached MMI statutorily on April 12, 2002, with a 16% IR.

The hearing officer did not err in rejecting the IR certification of the designated doctor. Section 408.125(e) provides that the report of the designated doctor shall have presumptive weight and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the other medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. We have held that the designated doctor is required to rate the entire injury. Texas Workers' Compensation Commission Appeal No. 951158, decided August 21, 1995. Whether the designated doctor's report is contrary to the great weight of the other medical evidence involves a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 000869, decided June 7, 2000. The hearing officer essentially determined that the designated doctor failed to properly assign a rating under the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, for the claimant's entire injury including RSD. In view of the evidence, we cannot conclude that the hearing officer's determination to reject the designated doctor's IR certification is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). It is clear that the designated doctor, in addition to questioning the validity of RSD, does not believe the claimant has RSD despite being told that it is part of the compensable injury.

The hearing officer erred in determining that the claimant's IR is 16% as certified by her treating doctor. While it is true that Section 408.125(e) allows the Commission to adopt the IR from another doctor if it is determined that the great weight of the other medical evidence is contrary to the rating given by the designated doctor, it is axiomatic that the rating adopted must be valid. The claimant's treating doctor made his certification of IR based upon the statutory date of MMI, April 12, 2002. However, the parties stipulated that MMI was reached on February 9, 2001. In Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004, the hearing officer determined that the designated doctor's amended IR certification, which was based upon post-MMI surgery, was entitled to presumptive weight. In reversing and remanding the case back to the hearing officer, we stated:

> Neither party, nor the hearing officer, reference [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3))] and we are cognizant that it was not in effect at the time of the CCH, however, it does give guidance on how Section 408.123(a) should be interpreted. Rule 130.1(c)(3) provides that the "[a]ssignment of an [IR] for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination." That rule has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. The preamble of Rule 130.1(c)(3)

> clarifies that IR assessments "must be based on the injured employee's condition as of the date of MMI." 29 Tex Reg. 2337 (2004). In response to public comment, the Commission in the preamble responded that "[I]n the event the MMI date is changed due to a post-MMI change in the injured employee's conditions, there should be a re-evaluation of the IR as of the new MMI date." The preamble also notes that in the event that the MMI date is changed the IR would have to be based on the injured employee's condition as of the changed MMI date. This interpretation is consistent with Section 408.123(a) and the Texas Supreme Court statement in Texas Workers' Compensation Commission, *et al*. v. Garcia, 893 S.W.2d 504 (Tex. 1995), which states that the IR is determined at MMI. Applying this interpretation to Section 408.123(a) the IR must be assessed as of the unappealed date of statutory MMI of January 5, 2001. We remand the case for the designated doctor to assess an IR for the compensable injury based on the injured employee's condition as of January 5, 2001.

Because the treating doctor's certification of IR was not based upon the claimant's condition on the stipulated date of MMI, February 9, 2001, it cannot be adopted. The only other certification of IR in the record was that of the carrier's RME doctor, who certified a 5% IR. The RME doctor's rating cannot be adopted for much the same reason that the designated doctor's rating cannot be adopted. The RME doctor did not issue a rating for the entire compensable injury, that is, RSD was not considered. Because there are no valid ratings, IR cannot be determined at this time. A second designated doctor should be appointed to determine the claimant's IR. The designated doctor should be advised that in determining the claimant's IR, he or she must consider the injury in its entirety, including the RSD. However, the designated doctor must also be advised that the IR has to be based on the claimant's condition as of the stipulated date of MMI, February 9, 2001.

The hearing officer's decision and order that the claimant's IR is 16% is reversed, and a new decision is rendered that the claimant's IR cannot be determined at this time.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Daniel R. Barry
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Edward Vilano
Appeals Judge